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Supreme Court of the United States

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No. 312

THE BOROUGH OF LITTLE FERRY, a municipal corporation of the State of New Jersey,

Petitioner,

vs.

BERGEN COUNTY SEWER AUTHORITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Borough of Little Ferry, a municipal corporation in the County of Bergen, and State of New Jersey, the petitioner herein prays that a writ of certiorari be issued to review the final judgment of the Supreme Court of the State of New Jersey, which upheld the constitutionality of the New Jersey Statute known as Public Laws 1946, Chapter 123 (Revised Statutes 40:36A-1 *et seq.*), under which the Bergen County Sewer Authority, the respondent herein, was established by the Board of Chosen Freeholders of Bergen County.

Statement of Matter Involved.

The case involves the legality and constitutionality of the Bergen County Sewer Authority, and its right under the Fourteenth Amendment to the Federal Constitution to condemn lands owned by the Borough of Little Ferry, and being used by the said Borough of Little Ferry for garbage disposal, for emergency drainage, and for recreational purposes, a lake on the property having been dedicated and reserved for emeregncy water supply purposes (R. 19, 20).

Jurisdiction.

1. The jurisdiction of the Supreme Court of the United States is invoked under Title 28, United States Code, Section 1257, which provides, in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * *
>
> (3) By writ of certiorari * * * where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States * * *."

2. The following cases are believed to sustain the jurisdiction of this Court:

Myles Salt Company, Board of Commissioners, 239 U. S. 478, 36 S. Ct. 204;
Fallbrook Irrigation District v. *Bradley,* 164 U. S. 112, 17 S. Ct. 56;
Hancock et al. v. *City of Muskogee,* 250 U. S. 454, 39 S. Ct. 528;
Withnell v. *Ruecking Const. Co.,* 249 U. S. 63, 39 S. Ct. 200;
Wagner, Inc. v. *Leser et als.,* 239 U. S. 207, 36 S. Ct. 66;
City of Pawhuska v. *Pawhuska Oil & Gas Co. et al.,* 250 U. S. 394, 39 S. Ct. 526;
O'Neill et al. v. *Leamer, et als.,* 239 U. S. 244, 36 S. Ct. 54;
Embree et al. v. *Kansas City et al.,* 240 U. S. 242, 36 S. Ct. 317.
Scott v. *McNeal et al.,* 154 U. S. 34, 14 S. Ct. 1108;
Chicago, B. & Q. R. Co. v. *City of Chicago,* 166 U. S. 226, 17 S. Ct. 581;

Home Teleph. & Teleg. Co. v. *Los Angeles,* 227 U. S. 278, 33 S. Ct. 312;
Mt. Hope Cemetery v. *City of Boston,* 158 Mass. 509, 33 N. E. 695;
62 C. J. S. 245, 246, and cases cited;
Public Service Electric & Gas Co. v. *City of Camden, et al.,* 118 N. J. L. 245, 192 Atl. 222;
Olesiewicz et al. v. *City of Camden et al.,* 100 N. J. L. 336, 126 Atl. 317;
Covington & L. Turnpike Road Co. v. *Sandford,* 164 U. S. 578, 17 S. Ct. 198.

3. The Supreme Court of the State of New Jersey is the highest court of the state.

4. The judgment of which review is sought is a final judgment of the Supreme Court of New Jersey (R. 27).

5. The judgment herein sought to be reviewed was filed on June 2, 1952 (R. 27).

6. The federal questions of substance which have been decided by the State Court are that

(A) Petitioner, a municipal corporation, is in no position to invoke the protection of the 14th Amendment against respondent Bergen County Sewer Authority, a body politic and corporate created, not by the State, but by another subdivision of the State, the Board of Chosen Freeholders of Bergen County, under P. L. 1946, Chapter 123, in a condemnation of public lands owned by the petitioner, and being used for both public and proprietary purposes, where said statute failed to give such right to condemn public lands, and in spite of the consistent objection by the municipality that said condemnation (1) deprived it of such property without due process of law, and (2) denied it the equal protection of the laws.

(B) The amendment of said P. L. 1946, Chapter 123, by P. L. 1950, Chapter 20, which provided the respondent Bergen County Sewer Authority with the right to condemn public lands, after the condemnation had been instituted on September 30, 1949, and after possession had been taken, was construed to be retroactive to said date of taking, in spite of the property rights of substance which were involved.

The decision of the Supreme Court of New Jersey is in conflict with the decisions in the following cases:

Chambers v. *Toohey*, 187 Atl. 49, 14 N. J. Misc. 780;
Claridge Apartments Co. v. *C. I. R.*, 323 U. S. 141, 65 S. Ct. 172;
Neel v. *Ball*, 6 N. J. 546, 79 Atl. 2nd 459;
Schwarzkopf v. *State House Commission*, 123 N. J. L. 78, 8 Atl. 2nd 103, aff. 125 N. J. L. 508, 17 Atl. 2nd 165;
Shack v. *Weissbard*, 130 N. J. L. 472, 33 Atl. 2nd 571, aff. 131 N. J. L. 472, 36 Atl. 2nd 594;
The Pocohontas, 20 F. Supp. 1004.

7. The federal question was timely raised and considered, having been set up in the original appeal to the Superior Court of New Jersey, Appellate Division, attacking the constitutionality of the Act (R. 20). The same point was raised in the first appeal to the New Jersey Supreme Court, which was dismissed without prejudice for procedural reasons (R. 20). The same point was raised in the complaint filed in lieu of prerogative writs (R. 20) (R. Appendix 3a) and in the appeal which was decided by the Supreme Court of New Jersey on June 2, 1952 (R. 20 and R. 25) Paragraph one of said complaint alleged that the lands being condemned are public lands of the Borough of Little Ferry, which had been and were then, in public use for public purposes (R. Appendix 1a).

The Answer filed by Respondent in the proceeding admitted the allegations of said Paragraph one (R. Appendix 12a).

Paragraph 8 (C) of said Complaint stated as follows: "R. S. 40:36A-1, *et seq.* (P. L. 1946, Chapter 123) violates the following provisions of the United States Constitution (1) Fifth Amendment. (2) Fourteenth Amendment" (R. Appendix 3a).

The Supreme Court of New Jersey also passed upon the petitioner's claimed constitutional right, saying:

"It is next argued the statute under consideration violates the Fourteenth Amendment to the United States Constitution. The point needs little consideration. 'The Act in no wise discriminates against the Borough and we fail to discern on what basis it might be held, in this proceeding, to conflict with the equal protection clause. Furthermore, the Legislature in authorizing the creation of regional bodies, such as the Sewer Authority, has ample power to impose their functions upon municipalities which are but creatures of the state (*Jersey City* vs. *Martin*, 126 N. J. L. 353, 361 (E. & A. 1941)) and are in no position to invoke against it the protection of the Fourteenth Amendment to the United States Constitution. *North Jersey District Water Supply Comm.* vs. *State Water Policy Comm.*, 129 N. J. L. 326, 332, (Sup. Ct. 1943. *Bergen County Sewer Authority* vs. *Borough of Little Ferry, supra.*" (R. 25).

Questions Presented.

1. Is the respondent, established under R. S. 40: 36A-1 *et seq.* (P. L. 1946, Chapter 123) a legal, valid and constitutional body, having the right and power to condemn the public lands of petitioner, already in public use?

2. Does the respondent under R. S. 40:36A-1 *et seq.* (P. L. 1946, Chapter 123) deprive the petitioner of property without due process of law?

3. Does the respondent under R. S. 40:36A-1 *et seq.* (P. L. 1946, Chapter 123) deny the petitioner the equal protection of the laws?

4. Has the New Jersey Supreme Court misconstrued existing law, and deprived petitioner of a property right of substance by applying P. L. 1950, Chapter 20, retroactively instead of prospectively, in contravention of the 14th Amendment?

Reasons Relied on for the Allowance of the Writ.

The Supreme Court of New Jersey has erroneously decided a federal question of substance not heretofore determined by this Court, arising under the 14th Amendment to the Federal Constitution, and has also decided a federal question of substance in a way probably not in accord with applicable decisions of this Court, and with the decisions hereinbefore set forth in Paragraph 6.

Your petitioner respectfully submits that the writ of certiorari should issue to the end that this Court may review the final judgment and decision of the Supreme Court of New Jersey, and determine whether that Court has deprived petitioner of rights guaranteed by the Fourteenth Amendment to the Federal Constitution.

Alfred W. Kiefer,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of the State of New Jersey is reported in 89 Atl. 2nd 18 (R. 19-26).

II.

Jurisdiction.

Jurisdiction is fully covered in the foregoing petition and the statement there made is here adopted by reference.

III.

Statement of the Case.

A concise statement of the case is set forth in the petition under the heading "Statement of the Matter Involved" and is adopted here by reference.

Additional statement discloses about 130 acres of public lands being involved in this condemnation. The Bergen County Sewer Authority was constituted by the Board of Chosen Freeholders of Bergen County after the Bergen-Hackensack Sanitary Sewer Authority, legislated into existence by the State of New Jersey under R. S. 58:15A-1, *et seq.* had been declared unconstitutional in the reported case of *Sherwood et al.* v. *Bergen-Hackensack Sanitary Sewer Authority et al.*, 135 N. J. L. 304, 51 Atl. 2nd 197.

It should be noted that this unconstitutional statute included by name exactly the same municipalities which now have been included in the present Bergen County Sewer Authority by resolution of the Freeholders of the County.

In short, the highest court of New Jersey has declared the previous district set up by the Legislature itself, as unconstitutional, but has upheld the constitutionality of the present district set up by a subdivision of the State.

IV.

Specifications of Error.

The New Jersey Supreme Court erred as follows:

(1) It held that P. L. 1950, Chapter 20, which provided the respondent Bergen County Sewer Authority with the express power to condemn public lands, as an amendment to P. L. 1946, Chapter 123, was retroactive in effect, and would validate a condemnation proceeding instituted prior thereto, in spite of property rights which were involved.

(2) It failed to declare P. L. 1946, Chapter 123 unconstitutional because of a lack of provision for notice or hearing for municipalities which were to be included in the district.

(3) It failed to declare P. L. 1946, Chapter 123 unconstitutional for failure to make mandatory the sharing of benefits by all municipalities which were to be included in the district.

(4) It failed to provide for damages sustained by petitioner from the time of the illegal taking of possession on September 30, 1949, the date of institution of condemnation proceedings, to the time of the validating statute.

(5) It failed to give proper legal effect to the statute P. L. 1933, Chapter 373 (R. S. 58:15) which by name already included petitioner within a bi-county sewerage disposal district.

V.

Summary of Argument.

POINT I. P. L. 1946, Chapter 123 violates the 14th Amendment because it failed to provide petitioner with an opportunity to be heard on the question of the formation of the Sewer District itself, or on petitioner's inclusion therein.

POINT II. P. L. 1946, Chapter 123 violates the 14th Amendment because it fails to provide mandatory sharing of benefits by all municipalities included in the Sewer District.

POINT III. P. L. 1946, Chapter 123 violates the 14th Amendment because it has been construed to permit a subdivision of a county government to do what the Legislature itself was unable to do.

POINT IV. P. L. 1946, Chapter 123 and P. L. 1950, Chapter 20 violate the 14th Amendment because they have been construed to permit a retroactive deprivation of petitioner's property without due process of law.

VI.

Argument.

POINT I.

P. L. 1946, Chapter 123 violates the 14th Amendment because it failed to provide petitioner with an opportunity to be heard on the question of the formation of the sewer district itself, or on petitioner's inclusion therein.

The petitioner was not given an opportunity to be heard on the creation of the Sewer District, and the statute failed to provide for such hearing.

Petitioner was already included in a sewer district whose purpose was to eliminate pollution of the Hackensack River, the only river touching petitioner's territory, under P. L. 1933, Chapter 373.

There was nothing in P. L. 1946, Chapter 123 which would indicate that it applied to petitioner or the same territorial district as was included in P. L. 1933, Chapter 373.

Actually, since P. L. 1933, Chapter 373 included municipalities in two counties, Bergen and Hudson, it was quite apparent that P. L. 1946, Chapter 123, which did not provide for joint county action, ought not to be construed as a repealer.

The inclusion of petitioner within the Bergen County Sewer Authority by the Board of Chosen Freeholders of Bergen County, and the condemnation of its lands is an abuse of power by said respondent, and an arbitrary legislative action, and thus contrary to the 14th Amendment.

Withnell v. *Ruecking Const. Co.*, 249 U. S. 63, 39 S. Ct. 200;

Phillip Wagner, Inc. v. *Leser, et als.*, 239 U. S. 207, 36 S. Ct. 66.

Where the Legislature, instead of determining for itself what lands shall be included in a district or what lands will be benefited by the construction of a sewer, submits the question to some board or other inferior tribunal with administrative or quasi judicial authority, the inquiry becomes in its nature judicial in the sense that property owners are entitled to a hearing or an opportunity to be heard before their lands are included.

Hancock et al. v. *City of Muskogee*, 250 U. S. 454, 39 S. Ct. 528.

POINT II.

P. L. 1946, Chapter 123 violates the 14th amendment because it fails to provide mandatorily for the sharing of benefits by all municipalities included in the sewer district.

The statute permits the freeholders of 1st or 2nd class counties in their discretion to set up a sewer district consisting of such area as the freeholders shall determine, and to add such additional territory from time to time, as the freeholders may again in their discretion determine.

The legislature has not determined the natural drainage area, nor the territory to be included therein. The legislature has not set standards for such determination.

P. L. 1946, Chapter 123 is defective and unconstitutional because it fails to make mandatory that *all* municipalities within the natural drainage are to be included in the sewerage district. It permits discrimination by the Freeholders to include some municipalities and to ignore others. It

fails to set up standards or norms for the inclusion of municipalities and the sharing of benefits.

> "All landowners in the district have the right to a proportionate share of the water, and no one landowner is favored above his fellow in his right to the use of the water."
>
> *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112, 17 S. Ct. 56;

See also,

> *W. S. Embree et al.* v. *Kansas City et al.*, 240 U. S. 242, 36 S. Ct. 317.

POINT III.

P. L. 1946, Chapter 123 violates the 14th amendment because it has been construed to permit a subdivision of a county government to do what the legislature itself was unable to do.

The statute achieves by indirection what the highest court of New Jersey previously said could not be done.

> *Sherwood et al.* v. *Bergen-Hackensack Sanitary Sewer Authority et al.*, 135 N. J. L. 304, 51 Atl. 2nd 197 (1947).

The *Sherwood* case prohibited dealing with the Hackensack drainage area on a basis limited to Bergen County alone, because its enabling legislation (P. L. 1945, Chapter 300) was considered and held to be special and local legislation.

If then the Act of the legislature itself was held unconstitutional because it dealt with the Hackensack River Drainage problem in too narrow a manner, then certainly the power delegated by the legislature to the Freeholders

of one county, resulting in the establishment of the respondent Bergen County Sewer Authority, in an area considerably less than the natural drainage area of the Hackensack River, must also be invalid.

Can the lesser body, a creature of the subdivision of government, possess or exercise a power or legislative will greater than the legislature itself?

If the purpose is, as set forth in Section 1 of the statute, to protect a river or stream from pollution *in the county*, then the exclusion or possible exclusion of municipalities in the natural drainage area or in the county, is arbitrary and an abuse of power, contrary to the 14th Amendment.

POINT IV.

P. L. 1946, Chapter 123 and P. L. 1950, Chapter 20 violate the 14th amendment because they have been construed to permit a retroactive deprivation of petitioner's property without due process of law.

Petitioner concedes that a municipal corporation is a political subdivision of the state whose powers may be amended, changed or revoked by the state.

> *Hunter* v. *Pittsburg*, 207 U. S. 161, 28 S. Ct. 40; *New Orleans* v. *New Orleans Waterworks Co.*, 142 U. S. 79, 12 S. Ct. 142.

The power of the state over the rights and properties of cities, held and used for governmental purposes, is distinguished from those held and used for private or proprietary purposes.

> *City of Trenton* v. *State of New Jersey*, 43 S. Ct. 534.

An appropriation of land for a sewerage district is essentially for a private purpose, and may be a deprivation of property without due process of law.

O'Neill et al. v. *Leamer et al.*, 239 U. S. 244, 36 S. Ct. 54;
City of Pawhuska v. *Pawhuska Oil & Gas Co. et al.*, 250 U. S. 394, 39 S. Ct. 526.

A state may not, by any of its agencies, disregard the prohibitions of the fourteenth amendment.

Chicago, B. & Q. R. Co. v. *City of Chicago*, 166 U. S. 226, 17 S. Ct. 581;
Home Teleph. & Teleg. Co. v. *Los Angeles*, 227 U. S. 278, 33 S. Ct. 312.

Corporations are persons within the meaning of the Constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.

Covington & L. Turnpike Road Co. v. *Sandford*, 164 U. S. 578, 17 S. Ct. 198.

The petitioner's property involved in the present condemnation is within the class of property which the petitioner owned in its private or proprietary character as a private corporation would own it.

Public Service Electric and Gas Co. v. *City of Camden*, 118 N. J. L. 245, 192 Atl. 222;
Olesiewicz et al. v. *City of Camden et al.*, 100 N. J. L. 336, 126 Atl. 317;
62 C. J. S. 245, 246, and cases cited;
Chicago, B. & Q. R. Co. v. *City of Chicago*, 166 U. S. 226, 17 S. Ct. 581;

Mt. Hope Cemetery v. *City of Boston*, 158 Mass. 509, 33 N. E. 695.

Retroactivity, even where permissible, is not favored except upon the clearest mandate.

Claridge Apartments Co. v. *C. I. R.*, 323 U. S. 141, 65 S. Ct. 172;
Chambers v. *Toohey*, 187 Atl. 49, 14 N. J. Misc. 780;
Schwarzkopf v. *State House Commission*, 123 N. J. L. 78, 8 Atl. 2nd 103, aff. 125 N. J. L. 508, 17 Atl. 2nd 165.

Generally, statutes relating to substantive law are not to be given retroactive application.

The Pocohontas, 20 F. Supp. 1004;
Neel v. *Ball*, 6 N. J. 546, 79 Atl. 2nd 459.

Statutes should not be given retrospective effect where property rights are adversely affected.

Shack v. *Weissbard*, 130 N. J L. 472, 33 Atl. 2nd 571, aff. 131 N. J. L. 472, 36 Atl. 2nd 594.

The New Jersey Supreme Court uses as the basis for its ruling on this point the New Jersey case of *Westinghouse Elec. Corp.* v. *United E. R. and M. Workers*, 49 Atl. 2nd 896, which adopted the rule of *Carpenter* v. *Wabash Railway Company*, 309 U. S. 23-30, 60 S. Ct. 416, and of *United States* v. *The Peggy*, 1 Cranch, U. S. 103.

These cases, however, deal with rules of procedure, rather than with matters of substance, such as property rights, and the deprivation thereof, and should not be controlling in the present case.

The P. L. 1946, Chapter 123, Section 36 expressly states that R. S. 20:1-1 *et seq.* which deals with Eminent Domain should govern the manner of condemnation. This Eminent Domain statute deals only with private property.

In view of this, it is evident that the petitioner has the same constitutional rights and protection as owners of private property, in condemnation proceedings brought by respondent.

P. L. 1950, Chapter 20 attempted to give the respondent the right to condemn public lands. Its effect, if any, should be restricted to condemnation proceedings brought subsequent to its enactment. The present condemnation proceedings having been instituted prior thereto, and possession illegally taken prior thereto, should not be considered validated, and petitioner should have provision made by law for illegal use and occupation of petitioner's lands.

Respectfully submitted,

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Statutes Appendix.

P. L. 1933, Chapter 373 (R. S. 58:15-1 *et seq.*)

R. S. 58:15-1 District created; municipalities within district.

All those cities, boroughs, towns, townships and villages (hereinafter in this chapter referred to as "municipality" or "municipalities") existing on September fifth, one thousand nine hundred and thirty-three, or thereafter created, all or parts of which are situate and lie within the natural drainage area of the Hackensack river and its tributaries between Newark bay and the boundary line between the state of New Jersey and the state of New York, of which those existing on said date are the following: The city of Bayonne, the city of Jersey City, the city of Union City, the town of West New York, the town of Guttenberg, the town of Secaucus, the town of Kearny and the township of North Bergen, in the county of Hudson, and the city of Englewood, the city of Hackensack, the borough of Fairview, the borough of Cliffside Park, the borough of Fort Lee, the borough of Englewood Cliffs, the borough of Tenafly, the borough of Alpine, the borough of Norwood, the borough of Rockleigh, the borough of Northvale, the borough of Ridgefield, the borough of Palisade Park, the borough of Leonia, the borough of Bogota, the borough of Bergenfield, the borough of New Milford, the borough of Dumont, the borough of Cresskill, the borough of Haworth, the borough of Demarest, the borough of Closter, the borough of Harrington Park, the borough of Old Tappen, the borough of Montvale, the borough of Woodcliffe Lake, the borough of Park Ridge, the borough of Hillsdale, the borough of Westwood, the borough of Emerson, the borough of Oradell, the borough of Paramus, the borough of Riverside, the borough of Maywood, the borough of Hasbrouck Heights, the borouh of Teterboro, the borough of Woodridge, the borough of Carlstadt, the borough of Little Ferry, the borough of Moonachie, the borough of East Rutherford, the borough of Rutherford, the borough of North Arlington, the township of Teaneck, the township of Riverdale, the township of

Washington, the township of Lodi, the township of Lyndhurst, and the village of Ridgefield Park, in the County of Bergen, constituted a sewerage district under the name and title of Hackensack river sewerage district, by the act entitled "An act creating the Hackensack river sewerage district, creating an authority to manage the same, and defining its power and duties, in connection with the construction and operations of a sewer in said district, and providing ways and means for paying the costs of construction and operation thereof," approved September fifth, one thousand nine hundred and thirty-three (L. 1933, c. 373, p. 1024), are continued as such sewerage district.

R. S. 58:15-3 Authority a corporate body; powers; "sewage" defined.

The Hackensack River sewerage authority (hereinafter in this chapter referred to as the "authority") shall constitute a body politic and corporate with perpetual succession under the name of "Hackensack River sewerage authority", as a governmental instrumentality for the purpose, among others, of the protection of the public safety, health and welfare, with power to sue and be sued, with power to adopt and use a corporate seal, with power to borrow money or contract debt and to issue negotiable bonds and to provide for the rights of the holders thereof, and with the right, power and authority to acquire, use, hold and dispose of all property, real and personal, and to make and perform all contracts, and to do and perform all acts and things and with all other powers proper or necesary, to design, finance, construct, acquire and operate, as hereinafter provided, such a system of trunk, intercepting and outlet sewers, pumping and ventilating stations, treatment plants or works or other plants and structures (hereinafter in this chapter sometimes referred to as the "district sewer system") as in its judgment will provide the most effectual and advantageous plan or method for relieving the Hackensack River and its tributaries from pollution and for preventing pollution of the same and for carrying out and effectuating the plan and purpose of this chapter.

Unless the context requires a different interpretation, the word "sewage" when used in this chapter shall be deemed to include industrial wastes and all other matter having a tendency to pollute the Hackensack River or its tributaries when discharged therein.

R. S. 20:1-1 Inability to acquire land by agreement with owner.

Except as otherwise provided by law, whenever the proper officers of the state, or of any county, or of any municipal corporation, or of any other corporation, public or private, having power to take land or other property for public use, shall have determined to acquire land or other property pursuant to authority conferred by law and cannot acquire such land or other property by agreement with the owner, whether by reason of disagreement as to the price, or the legal incapacity or absence of the owner, or his inability to convey valid title, or the lack of authority of the party determining to acquire the property to do so by agreement, or by reason of any other cause, the compensation shall be ascertained and paid in the manner directed by this chapter.

Laws of 1950, Chapter 20.

AN ACT to amend "An act relating to the establishment of sewerage districts in first- and second-class counties, the creation of sanitary sewer district authorities by the establishing of such districts, prescribing the powers and duties of any such authority and of other public bodies in connection with the construction of sewers and sewage disposal facilities in any such district, and providing the ways and means for paying the costs of construction and operation thereof," approved April twenty-third, one thousand nine hundred and forty-six (P. L. 1946, c. 123).

WHEREAS, A public agency may be authorized by law to take property already devoted to public use, for another or different public use, subject to the condition that any such authority be given specifically by legislative enact-

ment; and the legislative intent in enacting chapter one hundred and twenty-three of the laws of one thousand nine hundred and forty-six, was to give the sanitary sewer district authorities established under the act, the right to condemn public lands, which intent is particularly shown by section twenty-four of said chapter; and

WHEREAS, The Court of Errors and Appeals in *State Highway Commission* vs. *The City of Elizabeth* (103 N. J. Eq. 376 affirming 102 N. J. Eq. 221), had established such proposition of law, as was known to and followed by the Legislature in enacting said chapter, but a possible doubt has now arisen by reason of the decision of our new court of last resort in the *New Jersey Turnpike Authority* case (3 N. J. 235 modifying and affirming 5 N. J. Super, 595) as to the future application of the rule laid down in the *State Highway Commission* case; and

WHEREAS, The Legislature does not perceive any actual conflict in the two decisions when they are carefully compared and differentiated, the enactment of this amendatory act is intended to remove any and all possible doubt as to the original intent and the efficacy of the original enactment, in giving the said sanitary sewer district authorities the right to condemn public lands, and will confirm such power already given, and clarify the legislative intent and confirm the power granted; now, therefore,

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Section thirty-six of the act of which this act is amendatory is amended to read as follows:

36. An authority shall have full power and authority in its name to acquire, by purchase, gift, grant, or devise, lands and rights or interest in lands, within its sewer district, which may be deemed by such authority necessary for the construction of any sewers, pumping or filtering stations, treatment plants or works or other plants and structures and the necessary appurtenances thereto, authorized

by this act. An authority shall have full power and authority to acquire such lands or rights and interests in lands, including public lands, parks, playgrounds, reservations, or parts thereof, or rights therein, by condemnation, in the manner provided by chapter one of the Title, Eminent Domain of the Revised Statutes (R. S. 20:1-1 et seq.); and upon the filing of a petition pursuant to said chapter may enter upon and take property in advance of making compensation therefor when for any reason it cannot acquire the property by agreement with the owner.

2. Section thirty-nine of the act of which this act is amendatory is amended to read as follows:

39. An authority may provide and install meters or other approved devices for measuring the flow of all sewage which shall be delivered and discharged into its district sewer system and may install such meters or other devices at the points of such delivery and discharge. An authority shall have full power and authoirty, in its discretion, to determine when and where such meters shall be installed, dependent upon its judgment as to whether the expense of providing and installing the meters is justified according to the anticipated use of the said sewer system, respectively, by any municipality, or private sewer company, or by any person, firm or corporation engaged in conducting or operating an industry, or owning or using any building or buildings. Where such meters are not installed, an authority may determine the quantity of the flowage into the sewer system, by reference to bills or on the basis of the number of plumbing fixtures, or by such other reasonably accurate methods as may be agreed upon between the said authority and any such user of the said sewer system.

3. This act shall take effect immediately.

Approved April 5, 1950.

Laws 1946, Ch. 123
R. S. 40:36A-1 et seq.

TITLE.

AN ACT relating to the establishment of sewerage districts in first- and second-class counties, the creation of sanitary sewer district authorities by the establishing of such districts, prescribing the powers and duties of any such authority and of other public bodies in connection with the construction of sewers and sewage disposal facilities in any such district, and providing the ways and means for paying the costs of construction and operation thereof.

40:36A-1. Establishment of district. Whenever any river or stream flows in, through or along the territory of any first- or second-class county and the natural drainage area of such river or stream within the county includes the territory of more than one municipality in the county and such river or stream is subject to pollution to such degree that, in the judgment of the board of chosen freeholders of the county, the pollution thereof is, or is likely to become, a threat to the public health of the communities within such drainage area, the board of chosen freeholders of such county hereby is authorized and empowered to establish, by resolution, a sewerage district for the purpose of protecting such river or stream from pollution in the county, which district shall consist of the territory of such municipalities, within the county, lying in whole or in part within the natural drainage area of such river or stream, within the county, as the board, in its judgment, shall determine to be practical and convenient to include within such district for such purpose by designation in such resolution, and of the territory of such other municipalities of the same character as may from time to time thereafter be included in such district by subsequent resolution or resolutions of such board of chosen freeholders. A resolution establishing a sewerage district shall designate an identifying name for such district.

Any resolution adopted under the provisions of this act [chapter] by a board of chosen freeholders shall be entered upon the minutes of said board and a copy of the same, certified by the clerk of the board, under the seal of the county, shall be filed in the office of the county clerk of the county wherein such district is situate and an additional copy so certified shall be filed with the state department of health.

40:36A-2. District authority; definitions; members; terms. Whenever in any such county a sewerage district is established under the provisions of this act [chapter] a sanitary sewer district authority shall thereby be created for such district to be known as the "———county——— sanitary sewer district authority" inserting the name of the county whose board of chosen freeholders established such district and the name designated by the said board to identify the district. Whenever "the county" is hereinafter referred to "the county" shall mean the county whose board of chosen freeholders established the sewerage district. Whenever an "authority" or the "authority" is hereinafter referred to "authority" shall mean a sanitary sewer district authority of a county created as provided by this act [chapter].

A sewerage district whenever established shall be deemed to be the district of the authority created by the establishment of the district.

An authority shall consist of five members (hereinafter sometimes referred to as "commissioners") who shall be appointed by the board of chosen freeholders of the county.

The commissioners first to be appointed shall be appointed at, or immediately following, the time of the adoption of the resolution establishing the sewerage district.

The commissioners first appointed shall hold office, one for one year, one for two years, one for three years, one for four years and one for five years. Upon the expiration of the term of office of any commissioner, his successor shall be appointed by the board of chosen freeholders of the county for the term of three years. Any vacancy occurring

by death, resignation or otherwise, shall be filled for the unexpired term only, in the same manner in which the original appointment was made.

40:36A-3. Oath of office; salary; expenses. The members of an authority shall be resident voters within its sewer district, and shall each take an oath of office, which shall be filed with the clerk of the board of chosen freeholders of the county and may each receive an annual salary, fixed as provided in this section, payable in equal monthly installments, and they shall receive no other compensation for such duties than that herein provided. Until the beginning of the second fiscal year of an authority, as determined by section forty-four, the salaries, if any, of the members of an authority shall be fixed annually for a period of not more than one year by the board of chosen freeholders of the county. In January of such second fiscal year, said board shall fix such salaries, if any, for the unexpired term of office of such members, and thereafter the salary, if any, of each member, for his term of office, shall be fixed by said board at the time of his appointment. Such salaries, if any, shall be paid by the authority. An authority may reimburse its members for necessary expenses incurred in the discharge of their duties.

40:36A-4. Removal for cause. Any member of an authority may be removed for cause by the board of chosen freeholders of the county, after notice and hearing, and no member shall continue to serve as a member unless he continues to be a resident voter within the sewer district.

40:36A-5. Interest in contracts forbidden; contracts voidable. No member of an authority shall be directly or indirectly interested in any contract made under the provisions of this act [chapter], nor in the furnishing of materials or supplies therefor to any person or corporation, nor in the furnishing of security for the performance of any such contract. If at any time it shall appear to the satisfaction of the board of chosen freeholders of the county that any member of an authority is violating or has violated the

provisions of this section, either directly or indirectly or by reason of ownership of stock in any corporation, or that he is the owner of any lands or rights and interests in lands taken or to be taken and used in or for any construction under the provisions of this act, or is a stockholder in any corporation owning or leasing such lands, or rights and interests in lands, it shall be the duty of the board of chosen freeholders to remove such member of the authority forthwith, and all contracts made by an authority wherein any such member shall have been interested, directly or indirectly, as aforesaid, shall thereupon be voidable at the option of the authority, and payments on account thereof may be stopped by the authority; provided, however, that the residence of any member of an authority in, or his capacity as any official or officer in the government of, or his liability to pay taxes, assessments or other charges to, the state, or any political subdivision thereof, or any like facts or circumstances, shall not be deemed to make him interested within the meaning, terms and provisions of this section.

40:36A-6. Organization; chairman, vice-chairman. An authority shall, at the earliest practicable time after the appointment of its first members, and annually thereafter, meet and organize by the election of a chairman and a vice-chairman who shall be members of the authority and shall serve for the current year and until their respective successors are appointed.

40:36A-7. Quorum; meetings; by-laws, rules and regulations, records. Three members shall constitute a quorum for the transaction of business at any meeting of an authority, and the affirmative vote of three members shall be necessary for the taking of any action. The meetings of an authority shall be public. An authority may adopt by-laws and rules and regulations for the conduct of its business and meetings, and shall cause full records to be kept of its proceedings, which shall be open to public inspection on reasonable notice, and at reasonable times.

40:36A-19. Body corporate; powers; seal. An authority shall be a body politic and corporate, with perpetual succession as a governmental instrumentality for the purpose, among others, of the protection of the public safety, health and welfare, with power to sue and be sued, to adopt and use a corporate seal, to borrow money or contract debt, to issue negotiable bonds, and to provide for the rights of the holders thereof, and with the right, power and authority to acquire, use, hold and dispose of all property, real and personal, and to make and perform all contracts and do all acts and things and with all other powers proper or necessary to design, finance, construct, acquire and operate as hereinafter provided, such a system of trunk, intercepting and outlet sewers, pumping and ventilating stations, treatment plants and other plants and structures (hereinafter sometimes referred to as the "district sewer system") as in its judgment will provide the most effectual and advantageous plan or method for relieving any river, and its tributaries and other streams, whether navigable or otherwise, within its sewer district, from pollution and for preventing pollution of the same, and for carrying out and effectuating the purposes and plan herein provided for. The word "sewage" when used in this act [chapter] shall be deemed to include industrial wastes and other matter having a tendency to pollute streams and watercourses when discharged therein.

40:36A-20. Obligations debts of authority only. An authority shall be a separate corporate entity, and the bonds and other obligations of an authority shall not be in any way a debt of the state or of any county or municipality, and shall not create any indebtedness or obligation, either legal, moral or otherwise, of the state or of any county or municipality, nor shall the state or any county or municipality be liable thereon, nor shall such bonds or other obligations be payable out of any funds other than those of the authority, and nothing in this act [chapter] contained shall be construed to authorize an authority to incur an indebtedness on behalf of or in any way to obligate the state or any county or municipality, except to the extent, if any,

provided in any contract entered into by any municipality, pursuant to the provisions of this act [chapter].

40:36A-21. Competitive system forbidden; rights unaffected. Whenever in any such county a sewerage district is established under the provisions of this act [chapter] the board of chosen freeholders of the county shall not establish another sewerage district which will be competitive with the district sewer system of the district first established and the state of New Jersey for itself and the county wherein the sewerage district is established does pledge to and agree with the holders of any bonds authorized to be issued pursuant to this act [chapter], that neither the state nor the county will establish such a competitive sewerage district or system and that neither the state nor the county will authorize the construction or maintenance of any system of trunk, intercepting and outlet sewers, pumping and filtering stations, works or other plants, or structures, which will be competitive with a district sewer system of an authority under this act [chapter], nor limit or alter the rights hereby vested in an authority or in any municipality to make, perform and enforce contracts entered into pursuant to this act [chapter], so as to produce sufficient revenue to meet the expense of maintenance and operation of such a district sewer system and to fulfill the terms of any agreements made with the holders of such bonds, or in any way impair the rights and remedies of such holders until the bonds, together with interest thereon, and with interest on any unpaid installment of interest, and all costs and expenses in connection with any actions, suits or proceedings by or on behalf of such holders, are fully met and discharged. Nothing in this section or act, or done pursuant thereto, shall, however, affect or limit in any way the rights or powers of the Passaic valley sewerage commissioners or the rights or powers of any municipality, any part of which is situated and lies within the natural drainage area of the Passaic river or its tributaries, to enter into and perform contracts with such commissioners, or be deemed to prohibit any municipality or municipalities, which shall not have

entered into a contract for sewage disposal with the authority, as herein set forth, from constructing its or their own sewage disposal plant, plants or joint plants in accordance with the provisions of section twenty-eight.

40:36A-22. Joint action. An authority may enter into contract with adjacent authorities, commissions, counties or other similar bodies, to convey to a point of treatment and to treat the sewerage of said bodies or to have said bodies convey to a point and to treat the sewage of said authority, whenever a plan of joint action is found to be necessary and proper by an authority.

40:36A-23. General powers. An authority shall have full power, authority and responsibility to do or to cause to be done, all acts and things necessary or proper in the designing, financing, construction, acquisition, maintenance and operation of its district sewer system, as authorized by this act [chapter], including but in no way limited to the negotiation and execution of all the various contracts hereinafter mentioned, the preparation of estimates, designs, working drawings and forms of contracts for construction work and permanent record drawings of completed construction work and property acquired, the supervision of all engineering and construction work, and the management and direction of the forces engaged in the construction or operation of its sewer system.

40:36A-24. Entry upon lands or waters. In the performance of the duties imposed upon it by law, an authority may, by its experts, engineers, officers, agents, employees, workmen and servants, enter at all times upon any lands or waters public or private, and make such reasonable use thereof as the authority may deem necessary or proper. Nothing contained in this act [chapter], shall authorize the authority to take property and to disturb facilities belonging to a common carrier engaged in interstate commerce unless provision is made for the restoration, relocation or duplication of such facilities elsewhere at the sole cost of the authority.

40:36A-28. Municipal contracts subject to approval. After the appointment of the members of an authority no municipality in its sewer district shall enter into a contract or other agreement for the construction or operation of a sewerage disposal plant or any other sewerage facilities for the use of more than one municipality, except with the prior written consent and approval of the authority; provided, however, that the foregoing provision may be changed by law and shall not prohibit contracts with the Passaic valley sewerage commissioners.

40:36A-33. Contracts with municipalities, private companies, industries. An authority may negotiate and enter into contracts, in the form and with the force and effect provided in sections fifty, fifty-one, fifty-two and fifty-three of this act [chapter], with municipalities within its sewer district and with private sewer companies operating therein and may negotiate and enter into like contracts with any other municipality or any private sewer company which may be discharging sewage directly or indirectly into any river or its tributaries and which might advantageously use the facilities of a proposed district sewer system, and may negotiate and enter into like contracts with persons or corporations engaged in public or private industry (herein called "industry" or "industries") within its sewer district who or which shall be discharging into any river or its tributaries any sewage which cannot conveniently be disposed of through the sewer system of any municipality or private sewer company. Nothing in this act [chapter] shall be construed to prohibit any municipality which has not entered into a contract with an authority, as herein provided, from constructing its own sewage disposal plant for its own sole use.

40:36A-34. Construction and acquisition of system. When and if an authority shall have entered into contracts with municipalities and private sewer companies pursuant to the next preceding section and section fifty of this act [chapter] which in its judgment will assure the annual

delivery and discharge into its district sewer system of an amount of sewage equal to or in excess of the amount of sewage estimated in a project report in accordance with subdivision (d) of section thirty of this act [chapter], such authority shall with all practicable speed commence and proceed with the construction and acquisition of its district sewer system.

40:36A-35. Discretion of authority. An authority shall have full discretion in the determination of the size, capacity, route and location of all trunk, intercepting and outlet sewers, pumping and filtering stations, treatment plants or works or other plants and structures, and is hereby empowered to proceed with the construction or acquisition or both, of its district sewer system, and to commence the operation thereof, in such sections or parts of the whole and at such time or times as such authority may deem proper or expedient and consistent with the plan or purpose of this act [chapter].

40:36A-36. Acquisition of lands; condemnation. An authority shall have full power and authority in its name to acquire, by purchase, gift, grant, or devise, lands and rights or interest in lands, within its sewer district, which may be deemed by such authority necessary for the construction of any sewers, pumping or filtering stations, treatment plants or works or other plants and structures and the necessary appurtenances thereto, authorized by this act [chapter]. An authority shall have full power and authority to acquire such lands or rights and interests in lands by condemnation, in the manner provided by chapter one of the title, Eminent Domain of the Revised Statutes (R. S. 20:1-1 *et seq.*); and upon the filing of a petition pursuant to said chapter may enter upon and take property in advance of making compensation therefor when for any reason it cannot acquire the property by agreement with the owner.

40:36A-37. Construction of system or part thereof. An authority shall have full power and authority in its dis-

cretion, at any time, and from time to time, after it has become authorized under this act [chapter], to proceed with the construction of its district sewer system, or any part or unit thereof.

40:36A-38. Title to property; exemption from taxes. The title to all property, real and personal, acquired by an authority to effectuate the purposes of this act [chapter] shall be vested in such authority. All property acquired by an authority for the purposes of this act [chapter] shall be exempt from municipal, county and state taxes.

40:36A-43. Rates; basis. After the commencement of of operation of a district sewer system of an authority under this act [chapter] the authority may prescribe and change from time to time rates to be charged for the discharge and disposal of sewage through its district sewer system. Said rates shall be prescribed and from time to time revised as hereinafter provided, so that an authority and its district sewer system shall be and always remain self-supporting with earnings sufficient to provide for all expenses of operation, maintenance, depreciation and repair and the payment of the principal and interest of any bonds issued or to be issued pursuant to this act [chapter], so as to prevent the accrual of any deficit. Such rates being in the nature of use or service charges, shall be uniform throughout a district for the same type, class and amount of use or service of a district sewer system and shall be based upon the total annual volume of sewerage from each municipality, private sewer company or institution; but may give weight to the characteristics of the sewage and other wastes and any other special matter affecting the cost of treatment and disposal thereof, including chlorine demand, biochemical oxygen demand, concentration of solids and chemical composition.

40:36A-45. Calculation of rates; provisions deemed contractual with bondholders. On or before the fifteenth day of January immediately preceding the beginning of any

first fiscal year, and on or before the fifteenth day of January in every year thereafter, each such authority shall calculate the rate pursuant to section forty-three of this act [chapter] upon which are to be based the payments to be made to it during the current fiscal year under any contracts made pursuant to section fifty of this act [chapter]. The rate referred to in section forty-three of this act [chapter] shall be caluculated to provide such amount as such authority reasonably estimates will be required (in addition to any funds on hand applicable to such purposes) during such fiscal year for security or payments of principal and interest of any of the bonds or other obligations authorized by this act [chapter] and for the cost of the operation, maintenance, depreciation and repair of its district sewer system, including establishment and maintenance of working capital and reserves. The provisions of this section and of section forty-three and of section forty-seven shall be deemed a contract between any authority and the holders of all bonds or other obligations authorized by this act [chapter] and issued by such authority and shall be enforceable by appropriate proceedings at law or in equity.

40:36A-50. Contracts with municipalities; others. Any municipality with which an authority is authorized to contract under the terms and provisions of section thirty-three of this act [chapter] shall have power, by ordinance of the body or board, by whatsoever name it may be known, having charge of the finances of said municipality (hereinafter called "governing body"), to authorize its proper officials to enter into and execute for it a perpetual contract, as hereinafter provided, with an authority, for the disposel of all or any specified part of the sewage arising or collected in or by such municipality, and such contract shall be valid and binding upon the municipality notwithstanding that no appropriation was made or provided to cover the estimated cost of such contract, and the governing body of the municipality shall have full power and authority to do and perform all acts and things on the part of the municipality

to be done and performed under the terms and provisions of such contract. Any private sewer company or industry shall likewise have power to enter into a contract with an authority for the disposal of its sewage or the sewage collected or discharged by it.

40:36A-51. Form; substance of contracts. The contracts of an authority with municipalities, private sewer companies and industries authorized by the next preceding section shall be in form to be prescribed by the contracting authority, shall upon execution be filed with the authority and shall provide in substance that the contracting municipality, private sewer company or industry shall, in the manner and at the time and place within the sewer district to be designated by such authority, permit the authority to connect the sewer or drainage system of such municipality, private sewer company or industry or the outfall thereof with, and thereafter deliver and discharge all sewage arising within it or collected by it into, any trunk or other sewer system or treatment plants or other plants or structures that such authority may specify and shall pay quarterly as defined in such contract to such authority, for the services thus rendered or to be rendered to it in the disposal of such sewage, the sum of money which shall theretofore have been calculated and certified to it by such authority as provided in section forty-seven of this act [chapter] and shall contain such other provisions as to the rights and powers of such authority and the duties and liabilities of the contracting municipality, private sewer company or industry in the event that such sums of money are not paid as provided in such contract or in the event of other default such contract on the part of such municipality, private sewer company or industry as may be prescribed by such authority, including without limitation provisions empowering such authority to refuse to permit such contracting municipality, private sewer company or industry to discharge into its district sewer system the sewage arising or collected in or by such contracting municipality, private sewer company or industry.

40:36A-52. Provision for payment by municipality. Each contract authorized by section fifty shall, if one of the parties thereto is a municipality, further provide in substance that the municipality shall in each year make provision for all payments to become due from it to the contracting authority, and said municipality shall pay the same as provided in said contract.

40:36A-53. Provisions of contract. Any contracts authorized by section fifty of this act [chapter] shall provide in substance that such contracts shall become null and void and have no further force and effect on and after a specified date unless the authority shall have sooner commenced the construction and acquisition of its district sewer system, or some part thereof, and may contain any other or further provisions which in the discretion of the parties to such contract may be necessary, proper or advisable for the purpose of obtaining or securing grants, loans or financial assistance of any kind or sort to or for the authority under any act of the congress of the United States of America.

40:36A-57. Payment by municipality; interest on default. The chief fiscal officer of each municipality which shall have entered into a contract pursuant to section fifty of this act [chapter], shall cause to be paid to the contracting authority, in quarterly payments, the amount of money certified to the municipality by such authority pursuant to section forty-seven of this act [chapter]. The power and obligation of such municipality to provide for and make all such payments shall be unlimited. If any part of the amount certified to a municipality by an authority, pursuant to section forty-seven of this act [chapter], shall remain unpaid for thirty days following the date fixed for payment by the contract, the municipality thus in default shall be charged with and liable for, and the chief fiscal officer thereof shall pay to such authority interest upon the amount unpaid at the rate of eight per centum (8%) per

annum. The provisions of this section shall be deemed a contract between each and every municipality which shall have entered into a contract pursuant to section fifty of this act, and the holders of all bonds authorized by this act, and shall be enforceable by appropriate action at law or suit in equity.

40:36A-58. Enforcement of obligations. Every obligation imposed upon any municipality, private sewer company or industry, by this act [chapter], and every obligation assumed by any municipality, private sewer company or industry, under any contract authorized hereby, shall be enforceable by mandamus or other appropriate action, suit or proceeding at law or in equity instituted by an authority.

40:36A-60. Grants of loans by U. S. Authority and all necessary powers are hereby given to do and perform all things and acts necessary and power is hereby granted to and conferred upon an authority to apply for and receive grants or loans to fulfill the purposes of this act [chapter] from the federal government or any agency thereof and to enter into any agreement, contract or other undertaking with the federal government, or any agency of the federal government for the purpose of obtaining grants, loans, or financial assistance of any kind or sort and under such conditions and such terms as may be determined to be advisable or necessary for the purpose of fulfilling the purposes of this act [chapter].

40:36A-61. Provisions of chapter controlling. In so far as the provisions of this act are inconsistent with the provisions of any act [chapter], general or special, the provisions of this act [chapter] shall be controlling.

40:36A-62. Construction of chapter; effect of partial invalidity. The object and design of this act [chapter] being the protection and preservation of public health, safety and welfare, this act [chapter] shall be liberally con-

strued and the powers granted and the duties imposed by this act [chapter] shall be construed to be independent and severable. If any one or more sections, clauses, sentences or parts of this act [chapter] shall for any reason be questioned in any court, and shall be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provisions so held unconstitutional or invalid.

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Supreme Court of the United States

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No. 312

THE BOROUGH OF LITTLE FERRY, a municipal corporation of the State of New Jersey,

Petitioner,

vs.

BERGEN COUNTY SEWER AUTHORITY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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